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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Question Presented For Review

May the New Jersey Division of Taxation, consistent with the due process clause of the Fourteenth Amendment, retroactively assess sales taxes against a New Jersey vendor based upon a changed interpretation of the law, which change was adopted without notice or an opportunity to comment in violation of the New Jersey Administrative Procedure Act?

Parties To The Proceedings

Petitioner Airwork Service Division was the plaintiff below.[1] Respondent Director of the Division of Taxation was the defendant below. Additional parties to the proceedings in the Supreme Court of New Jersey were *amicus curiae* Consumer Bureau, Inc. and the American Civil Liberties Union.

[1] Pursuant to this Court's Rule 28.1, petitioner Airwork Service Division lists the following corporate relationships: Airwork is a wholly-owned subsidiary of Purex Industries, Inc. Purex Industries, Inc. has six other wholly-owned subsidiaries: Pacific Airmotive Corporation, Prosser Industries, Inc., Baron Blakeslee, Inc., Purex Pool Products, Inc., Ellio's Pizza, Inc. and Purex Corporation. Purex Corporation, in turn, has two wholly-owned subsidiaries: TPI Corporation and Purex Export Corporation.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties to the Proceedings	i
Table of Authorities	iii
Reference to the Opinions Below	1
Jurisdictional Statement	2
Constitutional and Statutory Provisions	2
Statement of the Case	2
The Tax Assessment	3
The Proceedings Below	5
The Opinions of the New Jersey Supreme Court	6
Reasons for Granting the Writ	7
The Decision Below Raises a Significant and Recurring Constitutional Issue Affecting the Due Process Rights of Taxpayers and the Powers of State Administrative Agencies	7
Preliminary Statement	7
The Actions of the Division Constituted Invalid Rule-Making in Violation of the APA and Deprived Petitioner of its Procedural Due Process Rights	8
The Assessment Against Airwork for Sales Tax Is Based on the Retroactive Application of a Change in the Division's Position and Violates Substantive Due Process	10
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

	PAGE
Cases:	
Central Illinois Public Service Co. v. United States, 435 U.S. 21 (1978)	11, 12
Fisher-Stevens, Inc. v. Director, Division of Taxation, No. S.T. 109 (1971), *aff'd*, 121 N.J. Super. 513 (App. Div. 1972), *certif. denied*, 62 N.J. 575 (1973)	5
Glaser v. Downes, 126 N.J. Super. 10 (App. Div. 1973), *certif. denied*, 64 N.J. 513 (1974)	8
Klebanow v. Glaser, 80 N.J. 367 (1979)	7, 10, 11
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940)	6
McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944)	6
Metromedia v. Director, Division of Taxation, 97 N.J. 313 (1984)	8
Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954)	6
Untermyer v. Anderson, 276 U.S. 440 (1928)	11
Welch v. Henry, 305 U.S. 134 (1938)	10, 11
Wood v. Georgia, 450 U.S. 261 (1981)	12
Statutes:	
28 *U.S.C.* § 1257(3)	2
N.J.S.A. 52:14B-1 *et seq.*	2
N.J.S.A. 52:14B-2(a)	8
N.J.S.A. 52:14B-2(e)	8
N.J.S.A. 52:14B-4(a)	8
N.J.S.A. 52:14B-4(d)	8
N.J.S.A. 54:32B-1 *et seq.*	2
Other Authorities:	
New Jersey St. Tax Rep. (CCH), No. 162 (July 11, 1966)	3-4, 9
Statement of Assembly Taxation Committee to Assembly, No. 1628	9
Statement of Assembly Taxation Committee to Assembly, No. 1787	9
State Tax News, August-September 1973	4, 5
State Tax News, October-November 1973	4, 5
U.S. Const., Amendment XIV	2

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Reference to the Opinion Below

The decision of the Supreme Court of the State of New Jersey was filed on July 23, 1984 and is reported at 97 N.J. 290, 478 A.2d 729 (1984).[2] Plaintiff's petition for rehearing was dismissed by Order of the New Jersey Supreme Court on October 23, 1984. An Order extending the time to file this petition for certiorari until March 22, 1985 was entered January 14, 1985.

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[2] The opinion is reproduced in the appendix to this petition commencing with page 1a. The opinion of the Appellate Division of the Superior Court of New Jersey appears at 4 N.J. Tax 532 (1982) and the opinion of the New Jersey Tax Court appears at 2 N.J. Tax 329 (1979).

Jurisdictional Statement

The judgment of the New Jersey Supreme Court was entered on July 23, 1984. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1257(3) (1976), upon the ground that the Petitioner claims a right under the United States Constitution not to be deprived of its property without due process of law.

Constitutional and Statutory Provisions

The principal issue in this case is whether the retroactive assessment of a sales tax by a state agency pursuant to a rule not enacted in accordance with the state Administrative Procedure Act violates the Due Process Clause of the Fourteenth Amendment—". . . nor shall any State deprive any person of . . . property, without due process of law. . . ."

STATEMENT OF THE CASE

On December 18, 1974, the New Jersey Division of Taxation ("Division") imposed an assessment of $628,255.31 (exclusive of interest and penalties) against Airwork Service Division ("Airwork") under the Sales and Use Tax Act, *N.J.S.A.* 54:32B-1 *et seq.* ("Act"), for sales of services where the serviced property was delivered by Airwork to its customers outside New Jersey. Airwork filed a Petition of Appeal with the New Jersey Tax Court (formerly the New Jersey Division of Tax Appeals) on several grounds, including that the Division's failure to comply with the notice and comment provisions of the state Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.* ("APA"), denied Airwork due process of law under the Fourteenth Amendment with regard to the challenged sales tax assessment. Pa 1.[3] The Tax Court rejected that argument. Pa 89-90. Airwork again raised the issue in its brief to the Appellate Division, but that court affirmed the order and judgment of the Tax Court in a terse *per curiam* opinion. Pa 173.

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[3] The record below is designated by reference to the Plaintiff's Appendix ("Pa") filed with the New Jersey Supreme Court.

The issue was again briefed for the New Jersey Supreme Court, which also considered and rejected the argument that the Division's assessment represented a reversal of its prior position with regard to sales tax on serviced property delivered out-of-state and that the rule reversing that position was adopted without compliance with the notice and comment requirements of the APA, thereby violating the due process clause of the Fourteenth Amendment. Instead, the Supreme Court erroneously concluded that the basis for the Division's tax assessment did not constitute administrative rule-making, and that it was therefore not subject to the APA. 13a.

The Tax Assessment

Airwork is principally engaged in the business of repairing and overhauling aircraft engines at its place of business in Millville, New Jersey.[4] From there, the repaired engines are returned to customers, generally out of state. With regard to sales where delivery of the serviced engine is in New Jersey or where the customers are located in New Jersey, since the enactment of the New Jersey Sales and Use Tax Act in 1966 Airwork collected and remitted to the Division all sales tax due and payable for repair work. However, with respect to sales to out-of-state customers, where delivery of the serviced property is made outside New Jersey, no sales tax was collected or remitted to the state from 1966 through 1973. Affidavit of Frederick W. Becker, ¶ 3, Pa 21 (hereinafter "Becker Aff. ¶ _____").

On or about June 28, 1966, the Sales Tax Bureau of the Division released and mailed to Commerce Clearing House ("CCH") an "Official News Release" consisting of 213 official questions and answers concerning the proper interpretation of the Act. The Release was received by CCH on July 5, 1966, and was included in CCH *New Jersey State Tax Reporter*, Report

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[4]Engines are delivered from around the world, usually by shipment of the engine alone by common carrier. At times, however, delivery is accomplished by an exchange transaction in which an engine needing overhaul is removed from a customer's aircraft, and exchanged for a "loaner" engine. After overhaul, the original engine is reinstalled, and the "loaner" returned, all at Airwork's Millville plant. The taxation of the "loaner" transactions was not in issue.

162 of July 11, 1966. Affidavit of Frederick M. Lappin, ¶ 5 and Exhibits B & C, Pa 24, 30 to 64 (hereinafter "Lappin Aff. ¶ _____"). Included in the Official News Release was the following statement by the Division:

> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

Pa 55. Since 1966, the Division has neither withdrawn nor amended the quoted statement from the June 28, 1966 Official News Release on which Airwork and its customers relied.

In July and August 1967, auditors from the Division examined the books and records of Airwork with respect to the application of the sales tax covering at least three separate periods of time. The auditors, consistent with the Release, did not assert any deficiency in connection with out-of-state sales. Becker Aff. ¶ 4, Pa 21.

In a publication of the Division dated August-September 1973, entitled *State Tax News* (which describes itself as a "bi-monthly newsletter of tax items of interest"), the Division, without notice or an opportunity to respond, reversed its prior position and announced that sales of services performed on goods delivered to customers outside the State were subject to the sales tax. Pa 84-85. In the next issue of the same publication, *State Tax News*, October-November 1973, the following appeared:

> *Services Performed In New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state. . . .

Once alerted by these announcements, Airwork invoiced its out-of-state customers for sales tax until the Legislature specifically exempted these transactions in 1977.

New Jersey's APA was enacted effective September 1, 1969. As noted by the Tax Court, none of the rule-making provisions of the APA, including the requirement of notice and opportunity to respond before the promulgation of rules or regulations, was followed in connection with the Division's publication of the August-September 1973 and October-November 1973 editions of the *State Tax News*. Pa 85.

In or about September 1973, the Division notified Airwork of its intention to make an assessment of sales and use tax covering the period July 1, 1970 to June 30, 1973. Because of the June 1966 news release, however, the Division later took the position that the assessment period began August 12, 1971, the date of the Division of Tax Appeal's decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation*, No. S.T. 109, 114 (1971), *aff'd*, 121 N.J. Super. 513 (App. Div. 1972), *certif. denied*, 62 N.J. 575 (1973), upon which the Division relied as authority for taxing sales of services where delivery is out-of-state. Lappin Aff., Exh. D, Pa 65-67. On October 3, 1974, an assessment for unpaid taxes was made. Lappin Aff. ¶ 7 and Exh. E, Pa 25, 68-70. Following a formal protest by Airwork and an informal conference in connection therewith, a "Revised Final Determination" was issued on December 18, 1974. Lappin Aff. ¶¶ 8, 9 and Exhs. F and G, Pa 25, 71-82.

The Proceedings Below

On March 14, 1975, Airwork filed a Petition of Appeal with the former New Jersey Division of Tax Appeals, contesting this "Revised Final Determination" ("Assessment"). Pa 1. On January 24, 1980, Airwork moved for summary judgment before the Honorable David E. Crabtree, J.T.C. The Division cross-moved for summary judgment. On March 27, 1981, Judge Crabtree issued an opinion in which he upheld the imposition of the Assessment under the Act, subject to Airwork's submitting proof that imposition of the Assessment would result in duplicative taxation. Pa 83-102. For reasons set forth in a letter from Airwork's counsel to Judge Crabtree dated June 11, 1981, Pa 103-05, Airwork chose to forego that opportunity, and an Order granting summary judgment in favor of the defendant was entered on July 6, 1981. Pa 106-07. A formal Judgment of Dismissal was entered on July 22, 1981. Pa 108.

Airwork filed a timely Notice of Appeal to the Appellate Division on August 5, 1981. Pa 109-12. On April 28, 1982, the Appellate Division affirmed the decision of the Tax Court substantially for the reasons expressed by Judge Crabtree. On May 18, 1982, Airwork filed a notice of petition for certification to the New Jersey Supreme Court, which was granted on January 10, 1983. On July 23, 1984, the Supreme Court, by a vote of 4 to 3, issued an opinion affirming the decision of the Appellate Division.

The Opinions of the New Jersey Supreme Court

Justice Handler's majority opinion first addressed the issue whether the underlying transactions were subject to the sales tax under the terms of the Act and concluded that they did come within the Act.[5] Second, the majority held that principles of equitable estoppel did not prevent the collection of the sales tax from Airwork, despite the Division's having audited Airwork's books twice during the summer of 1967 and having made no attempt to collect taxes on Airwork's repair services during the early years of the sales tax. 8a-11a. Third, and most important to this Petition, the majority agreed with the Tax Court's conclusion that "the Division's tax assessment did not constitute rule-making and therefore was not subject to the APA," 11a, thus relieving the Court of the need to address the alleged due process violation.

Justice Garibaldi's strong dissent, joined by two other justices, concluded that the Division had reversed its own position and had imposed a retroactive sales tax, which offended "fundamental concepts of fairness relating to agency conduct." 14a. The dissent agreed with Airwork that the Division's action produced "an extraordinarily harsh and unfair result," 25a, in that

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[5] It is at least questionable whether New Jersey may constitutionally tax out-of-state purchasers for services performed on property which is delivered out-of-state for use outside the state. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). It is even more questionable whether an in-state vendor can be liable for a sales tax that its customers—the object of the tax—need not pay. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

"the reversal of the rule has transformed a statutory agent for the collection of tax into a delinquent taxpayer." 23a. Noting that the New Jersey Supreme Court has recognized that constitutional due process imposes certain limits on the retroactive application of taxing statutes, *see Klebanow v. Glaser*, 80 N.J. 367, 376 (1979), 22a, the dissent concluded that the actions of the Division in this case rendered the sales tax assessment against Airwork invalid.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises a Significant and Recurring Constitutional Issue Affecting the Due Process Rights of Taxpayers and the Powers of State Administrative Agencies

Preliminary Statement

Although it may appear at first that this case involves a matter of state administrative procedure better left to the interpretation of state courts, there is no doubt that fundamental federal constitutional rights are at stake that require and deserve protection. The harsh and unjust effects of the decision in this case will not be limited to a specific narrow class of taxpayers, but will be felt by all those who must interact with state administrative agencies—agencies that oftentimes assert their assumed power in circumvention of a procedural system that was implemented to promote efficient and effective government, as well as to protect the interests and rights of all citizens.

The conduct of the Division in this case clearly constituted invalid rule-making and as such violated the procedural due process rights of Airwork and all similarly-situated taxpayers. Moreover, the retroactive nature of this Assessment violates principles of fundamental fairness and offends substantive due process. *See infra*. No agency or court should be permitted to avoid the consideration and resolution of due process violations merely by manipulating the definition of rule-making such that challenged agency conduct is deemed not to fall within the APA.

The Actions of the Division Constituted Invalid Rule-Making in Violation of the APA and Deprived Petitioner of its Procedural Due Process Rights

The APA governs agency rule-making and expressly provides that no rule is valid unless adopted in substantial compliance with the notice and hearing requirements found therein. *N.J.S.A.* 52:14B-4(d).[6] There can be no doubt that the Division is a "state agency" subject to the APA. *N.J.S.A.* 52:14B-2(a); *Glaser v. Downes*, 126 N.J. Super. 10, 19 (App. Div. 1973), *certif. denied*, 64 N.J. 513 (1974). Thus, when the Division or any agency takes action that amounts to rule-making, but fails to comply with the APA, its actions are invalid and without effect. That is precisely what happened in this case and we respectfully submit that the Supreme Court erred as a matter of law in concluding otherwise.

An "administrative rule" has been defined by statute, *N.J.S.A.* 52:14B-2(e), and by case law. In *Metromedia v. Director, Division of Taxation*, 97 N.J. 313 (1984), the Court addressed the question of when a determination of the Division of Taxation imposing a tax assessment can appropriately be found to implicate agency rule-making, thereby necessitating conformity with the APA, and set forth relevant factors to be considered. *Id.* at 331-32. The *Airwork* majority purported to apply the *Metromedia* standards in reaching the conclusion that the Director's assessment "was not invalid for want of an authorizing rule or regulation." 12a. However, as to those factors that the *Airwork* majority deemed determinative, the Court's findings cannot stand as a matter of fact or law.

First, the *Airwork* majority stated that "the taxability of these services [performed by Airwork] is sufficiently clearly and directly inferable from the tax statute itself, especially in the absence of a specific exemption." 12a-13a. To the contrary, the case law and legislative history demonstrate that the Act was not

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[6] N.J.S.A. 52:14B-4(a) requires at least 30 days notice of the intended action, an opportunity afforded all interested persons to submit data, views or arguments (orally or in writing), and agency consideration of all such submissions.

intended to authorize a tax on sale of services where the serviced property is delivered, and, therefore, the sale transacted, out-of-state. See note 5 *supra*; Statement of Assembly Taxation Committee to Assembly, No. 1628; Statement of Assembly Taxation Committee to Assembly, No. 1787.

Second, the *Airwork* majority concluded that "it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though for several years the taxing authority did not impose the tax. Past policy was itself equivocal, was not officially endorsed, and was not definitively settled." 13a. To the contrary, this conclusion represents an error of law because it is based on erroneous factual assumptions. As noted by Justice Garibaldi, "(t)he Division cannot seriously maintain that it never changed its interpretation of the Act." 18a (Garibaldi, J., dissenting).

In 1966 the Division issued an "Official News Release" which made clear that charges for repairs such as those performed by Airwork were exempt from the sales tax. *New Jersey St. Tax Rep.* (CCH), No. 162 (July 11, 1966). In 1967, the Division performed a tax audit of Airwork and gave no indication that Airwork's policy of not collecting sales tax from out-of-state customers was incorrect. Not until 1973 did the Division first publish two documents contradicting the Release, at which time the Division announced a "complete reversal of its prior position and announced that sales of services performed on goods delivered to customers outside the State were subject to the sales tax." 17a (Garibaldi, J., dissenting). These two documents, both of which have their source in the Division, clearly comprise "official endorsement" of a change in policy. The majority's cursory conclusion to the contrary is simply and completely unsupported.

Also unsupported is the *Airwork* majority's blanket assertion that "it seems clear that the agency action properly applies retroactively to this particular case and could be applied to similarly situated taxpayers." 13a. As Justice Garibaldi pointed out, the New Jersey Supreme Court "has recognized that constitutional due process imposes certain limits on the retroactive appli-

cation of taxing statutes." 22a (Garibaldi, J., dissenting), citing *Welch v. Henry*, 305 U.S. 134, 147 (1938) and *Klebanow v. Glaser*, 80 N.J. 367, 376 (1979). As discussed *infra*, the retroactive application of the agency rule in this case results in such hardship and unfairness that it amounts to a violation of substantive due process.[7] This Court should not allow the majority's unsupported assertion to go unchallenged given the importance of the constitutional rights involved.

Finally, while the *Metromedia* decision may add meaningfully to the jurisprudence in this area, the standards announced there must be consistently applied. Having stated a test to determine what constitutes administrative agency rulemaking, the Supreme Court must be true to that test. If it misapplies the test, to the detriment of a taxpayer's constitutional rights, the only avenue of redress left for that taxpayer is to petition this Court for relief.

The Assessment Against Airwork for Sales Tax Is Based on the Retroactive Application of a Change in the Division's Position and Violates Substantive Due Process

Airwork has consistently maintained throughout this litigation that the retroactive imposition of the sales tax under the circumstances of this case violated principles of fundamental fairness. Three justices of the Supreme Court were persuaded by this argument, agreeing in dissent that "the retroactive imposition of the sales tax produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct." 14a (Garibaldi, J., dissenting).

Based on the facts as explained *supra*, the question for the Court is whether, given the nature of the sales tax, the prior position taken by the State agency, and Airwork's understandable reliance on that announced position, imposing primary liability on Airwork for taxes it can no longer collect from its

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[7] *Amicus* American Civil Liberties Union of New Jersey argued below that the retroactive imposition of the sales tax violated Airwork's constitutional right to substantive due process under both federal and state constitutions. The New Jersey Supreme Court declined to address that issue. 13a. See note 8 *infra*.

customers produces a result so harsh and unfair as to violate substantive due process. As stated by this Court in *Welch v. Henry*, 305 U.S. 134, 147 (1938), and quoted with approval by the New Jersey Supreme Court in *Klebanow v. Glaser*, 80 N.J. 367, 376 (1979):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

As to the nature of the tax, Airwork's role in the statutory scheme is a tax collector on behalf of the State. The effect of retroactive application is to allow the consumer to escape the tax, while imposing it instead on the vendor. "As such, retroactive application changes the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services." 23a (Garibaldi, J., dissenting). *Cf. Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 33 n.12 (1978) (expressing concern that retroactive assessment of tax on an employer who had failed in good faith to withhold taxes for employee wages in the form of lunch reimbursement would be "almost punitive in light of the facts").

The result is even more harsh when one considers that Airwork could have avoided liability had it known that the tax was due. *See Welch v. Henry, supra*, 305 U.S. at 147. Airwork would not have failed to collect and turn over the sales tax allegedly owed by its out-of-state customers had it known or anticipated that its repairs on out-of-state property would be taxed. Indeed, once Airwork received notice in 1973 that the State intended to treat these repairs as taxable, it immediately began invoicing its out-of-state customers for sales tax. Under such circumstances, the imposition of a retroactive tax would hardly seem "consonant with justice" and would involve substantial hardship. *Untermyer v. Anderson*, 276 U.S. 440, 450 (1928) (Brandeis, J., dissenting), *quoted in Klebanow v. Glaser, supra*, 80 N.J. at 375. *Cf. Central Illinois Public Service Co. v. United*

States, 435 U.S. 21, 38 (1978) (Powell, J., concurring) ("In view of the complexities of federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the absence of such notice or of clear congressional authorization.").[8]

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[8] As noted earlier, the *Airwork* majority found that the "agency action properly applies retroactively to this particular case." 13a. However, the Court never addressed the issue of retroactivity in terms of the constitutional issues asserted by Airwork and by *amicus*. 13a. The Supreme Court declined to address those arguments "in the absence of their consideration by the lower courts" and "without a sound and complete record to demonstrate their viability." 13a. While we dispute the Supreme Court's assessment of the record below and urge this Court to resolve these issues, we recognize that this Court may be reluctant to address these issues in the first instance. However, there is ample precedent to allow this Court to grant a petition for a writ of certiorari in order to remand a matter to a lower court for further consideration. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 264-65 (1981). In light of the hardship and fundamental unfairness resulting from the action of the Division, as approved by the state courts, this Court should take appropriate action to redress the violations of Airwork's constitutional rights.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Court should issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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Dated: March 22, 1985

OPINION OF THE SUPREME COURT
OF
NEW JERSEY

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION, PLAINTIFF-APPELLANT, v. DIRECTOR, DIVISION OF TAXATION, DEFENDANT-RESPONDENT.

Argued November 7, 1983—Decided July 23, 1984.

SYNOPSIS

Taxpayer engaged in business of repairing airplane engines appealed from assessment of sales tax on services sold to out-of-state customers. The Tax Court, 2 N.J. Tax 329, held the assessment valid, and taxpayer appealed. The Superior Court, Appellate Division, 4 N.J. Tax 532, affirmed. Petition for certification was granted. The Supreme Court, Handler, J., held that sales of service of repairing airplane engines to out-of-state customers was subject to the sales tax.

Affirmed.

Garibaldi, J., dissented and filed opinion in which Clifford and Pollock, JJ., joined.

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1. Taxation ⇐1246

Sale of service of repairing airplane engines to out-of-state customers was subject to state sales tax. N.J.S.A. 54:32B-2(f,i), 54:32B-8.35.

2. Statutes ⇐219(1)

Court will consider practical administrative construction of statute only when it is not satisfied that legislature's intent can-

not otherwise be determined by critical examination of purposes, policies, and language of enactment.

3. Statutes ⇦219(4)

When critical examination of purposes, policies, and language of enactment points strongly to imputation of particular legislative intent, they may not be outweighed or overcome simply by countervailing administrative practice.

4. Estoppel ⇦62.2(2)

Director of taxation was not equitably estopped from collecting sales tax on sales of service of repairing airplane engines to out-of-state customers by having failed to collect taxes during early years of the sales tax where taxpayer's reliance was claimed to be based on unofficial statements and equivocal administrative inaction.

5. Taxation ⇦1246

Assessment of sales tax on sales of service of repairing airplane engines to out-of-state customers was not invalid for want of authorizing rule or regulation where taxability of the services was sufficiently inferable from tax statute itself and where it was not demonstrated that assessment represented material and significant change in administrative policy.

Gerald C. Neary argued the cause for appellant *(Pitney, Hardin, Kipp & Szuch,* attorneys; *Gerald C. Neary* and *Jeri E. Ruscoll,* on the briefs).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent *(Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *James J. Ciancia,* Assistant Attorney General, of counsel).

John W. Boyd, a member of the New Mexico bar, argued the cause for *amicus curiae* Consumer Bureau, Inc. *(Pollan and Pollan*, attorneys; *Steven E. Pollan*, of counsel and on the brief).

Robert A. Goodsell submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey *(Irwin, Post & Rosen*, attorneys.)

The opinion of the Court was delivered by

HANDLER, J.

Plaintiff, Airwork Service Division (Airwork or taxpayer) is in the business of repairing airplane engines. All repairs are made at Airwork's facilities in New Jersey, and the repaired engines are then returned to customers, generally out of state. Defendant, Director, Division of Taxation (Director) notified Airwork in September 1973 of its intention to assess it for sales tax on services rendered between July 1, 1970 and June 30, 1973, under the New Jersey Sales and Use Tax Act, *N.J.S.A.* 54:32B-1 to -29 (Act). Airwork filed an appeal of the assessment with the Division of Tax Appeals in 1975, which was later heard by the Tax Court on cross-motions for summary judgment. The Tax Court held the assessment valid, granting the Director partial summary judgment. 2 *N.J.Tax* 329 (1981). Airwork appealed and the Appellate Division affirmed. We granted the taxpayer's petition for certification. 93 *N.J.* 246 (1983.)

I

The question that we first address is whether the underlying transactions are subject to the sales tax under the terms of the Act.

N.J.S.A. 54:32B-3 imposes a sales tax on the sale of tangible personal property and on the performance of certain services. *N.J.S.A.* 54:32B-2(f). The repair of airplane engines is a service

covered by the Act. *N.J.S.A.* 54:32B-8.35. The taxpayer stresses, however, that while the repair services on these airplanes are rendered in New Jersey, the engines are later returned to out-of-state customers. It is contended that because the sale occurs at the place of delivery, the services should be deemed to have been sold or completed at the site to which the returned property is delivered. The taxpayer points to provisions of the Act that treat the sale of goods and services equivalently, *e.g., N.J.S.A.* 54:32B-2(i) (defining "vendor"). Because the Act intends to tax only sales made within New Jersey, the argument continues, the Legislature cannot have intended to tax services performed on goods to be delivered to customers in other states.

This argument is not persuasive. It assuredly does not attain constitutional dimensions. In *Evco v. Jones,* 409 U.S. 91, 93, 93 S. Ct. 349, 350, 34 L.Ed.2d 325, 328 (1972), the Court distinguished between a "tax" * * * validly imposed on the service performed in the taxing State," and "a tax levied on the gross receipts from the sales of tangible personal property in another State," holding only the latter unconstitutional. Notwithstanding that the Legislature may have treated goods and services similarly for most purposes, it is entirely possible that it recognized the difference between the place where the finished product is delivered and where services upon it are rendered, in terms of subjecting services to taxation in a case such as this. *See Fisher-Stevens, Inc, v. Director, Div. of Taxation,* 121 *N.J. Super.* 513 (App.Div.1972), certif. den., 62 *N.J.* 575 (1973).

[1] The critical issue is whether the Legislature intended to tax services such as those performed by Airwork. In looking first to the statutory language as such, we are struck by the fact that the services performed in New Jersey on goods delivered out of state are not specifically exempted from the application of the Act. *N.J.S.A.* 54:32B-3(b)(2). We have recently acknowledged, in a somewhat variant context, that such exemptions, if they are

present, must be narrowly and strictly construed and, if not clearly applicable, the underlying transaction must be amenable to the tax. *See Metpath v. Director, Div. of Taxation*, 96 *N.J.* 147 *(1984) (provision of Act exempting from tax all catalysts "that do not become a component part of finished product" is limited to chemicals used to produce tangible personal property); Tuscan Dairy Farms, Inc. v. Director, Div. of Taxation*, 4 *N.J.Tax* 92 (1982).

The Tax Court here determined that the Act's failure to include an exemption from the sales tax of services to property delivered out of state was purposeful. 2 *N.J.Tax* at 345. Such an exemption was expressly contained in the New York Sales and Compensating Use Tax Laws, § 1101 *et seq.* (McKinney 1979), which served as a model to the New Jersey Act. "Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate." 2 *N.J.Tax* at 346. Clearly, the rendition of services in conjunction with the delivery of products out of state is not uncommon. *E.g., Fisher-Stevens, Inc., supra*, 121 *N.J.Super.* 513. Accordingly, we adopt the Tax Court's conclusion that the Legislature purposefully chose not to exempt these services. *See Evco v. Jones, supra*, 409 *U.S.* 91, 93 *S.Ct.* 349, 34 *L.Ed.*2d 325; *see also Bank of America v. Webster*, 439 F.2d 691 (9th Cir. 1971).

The taxpayer, however, points to historical circumstance to support its contention. The Act was passed in 1966 to be effective July 1 of that year. On June 28, 1966 the Sales and Use Tax Bureau of the Division of Taxation issued a press release, containing questions and answers about the Act, that was published on July 11, 1966, in a commercial tax news service—Report 162 of the Commerce Clearing House *New Jersey Tax Reports*. The press release included the following statement:

Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

Airwork claims that this published statement is equated with an official policy adopted by the Division of Taxation. Nevertheless, the issue of the taxability of services performed for out-of-state customers was being actively litigated. It was—or should have been—well known to similarly situated taxpayers that the Division of Taxation was vigorously taking the position that such services were taxable. The issue was finally resolved in 1972 by the decision of the Appellate Division in *Fisher-Stevens, Inc., supra,* 121 *N.J.Super.* 513, affirming the 1971 determination of the Division of Tax Appeals, Docket S.T. 109, which held that a company providing direct mailing services in New Jersey with materials sent chiefly to addresses in other states on behalf of out-of-state customers was subject to the sales tax for the services performed in New Jersey.

The taxpayer further notes that following the enactment of the statute, the Legislature failed to object to the Division's "position," ostensibly appearing in the 1966 press release. Airwork draws the conclusion that the Division's policy therefore met with legislative approval and conformed to the Legislature's intent. In general, the legislative attitude towards enacted legislation is a marginal tool of interpretation, even under the most propitious circumstances. 2A *Sutherland, Statutory Construction* § 48.06 (4th ed. 1972). The generally limited usefulness of coupling administrative practice with legislative inaction to extrapolate legislative intent is further reduced when the agency attitude itself is unofficial and equivocal. As the Division points out, the earlier press release was never officially approved or even authenticated as an official pronouncement. Further, to the extent there were any officially endorsed statements on this subject matter, these were set forth in the general instructions accompanying the official tax returns. The instruc-

tions did not authorize or permit the exclusion of services performed on goods delivered outside New Jersey. Moreover, following its successful litigation of the issue in 1972, the Division affirmatively sought to dispel the possible confusion generated by the earlier press release by specifically stating, in two separate issues of *State Tax News*, a bi-monthly newsletter published by the Division itself, that the sales tax did apply to repair services performed in New Jersey, regardless of where the repaired property was to be delivered.

[2,3] We note that courts have acknowledged that "the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts." *Automatic Merchandising Council v. Glaser*, 127 *N.J.Super.* 413, 420 (App.Div.1974) (interpreting Sales and Use Tax Act); *see Malone v. Fender*, 80 *N.J.* 129 (1979). Nevertheless, the court will consider this factor only when it is not satisfied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. *See Fedders Corp. v. Director, Div. of Taxation*, 96 *N.J.* 376 (1984) (language, purpose, and policy of "indebtedness" clause in New Jersey Corporation Business Tax Act evidenced legislative intent to exclude *bona fide* debt owed to affiliated corporation, notwithstanding contrary administrative interpretation that was itself confirmed by administrative rule and longstanding, uniform agency practice); *Mobay Corp. v. Director, Div. of Taxation*, 96 *N.J.* 407 (1984) (same).

We conclude, therefore, that the Act authorizes the imposition of a sales tax on the performance of services rendered in the state on goods to be delivered to customers outside the State.

II

[4] The Division made no attempt to collect taxes on taxpayer's repair work during the early years of the sales tax, despite its having audited plaintiff's books during the summer of 1967. Because the taxpayer assertedly relied on the Division's previous position, it argues that the tax assessment against it is improper.

This argument is analogous to one based on principles of equitable estoppel. In *New Jersey Turnpike Auth. v. Washington Tp.*, 137 *N.J.Super.* 543, 552 (App.Div.1975), aff'd o.b., 73 *N.J.* 180 (1977), the court remarked that "the application of principles of estoppel [is] particularly inappropriate where the collection of taxes by a public body is involved, except in unusual circumstances." *See also Bayonne v. Murphy & Perrett Co.*, 7 *N.J.* 298 (1951)(taxing authority is not bound or estopped by unauthorized acts of its officers). In *Skulski v. Nolan*, 68 *N.J.* 179, 198 (1975), this Court recognized that "the concept of estoppel is not applied as readily against the public as against private persons." *Id.; see Zigmont v. Bd. of Trustees, Teachers' Pension & Annuity Fund*, 91 *N.J.* 580 (1983). The issue thus becomes whether the circumstances of this case warrant the unusual remedy of estopping the government from collecting taxes because the taxpayer has assertedly relied on earlier statements by the taxing authority.

A number of cases in other jurisdictions have refused to allow an estoppel against a taxing authority. *E.g., Crane Co. v. Arizona State Tax Comm'n*, 63 *Ariz.* 426, 163 *P.*2d 656 (1945), overruled on other grounds *sub nom. Duhame v. State Tax Comm'n*, 65 *Ariz.* 268, 179 *P.*2d 252(1947); *Market Street Ry. Co. v. California State Bd. of Equalization*, 137 *Cal.App.* 2d 87, 290 *P.*2d 20 (Dist.Ct.App.1955); *La Societe Francaise v. California Employment Comm.*, 56 *Cal.App.*2d 534, 133 *P.*2d 47 (Dist.Ct.App.1943). The application of this equitable doc-

trine is extremely fact-sensitive. The Division stresses that Airwork has not demonstrated actual or reasonable reliance on any definitive official conduct on the part of the Division. As noted, no express exemption is provided by the Act itself. The press release, published in a private, commercial tax news service, was not shown to be an official statement or pronouncement. In addition, according to the Division, that release contained inaccuracies and outdated information, suggesting a lack of reliability. *See Iowa Movers & Warehousemen's Ass'n v. Briggs,* 237 *N.W.*2d 759 (Iowa 1976) (taxing authority not estopped from imposing tax contrary to past enforcement policy when taxpayer failed to prove actual reliance); *see also Dixon v. United States,* 381 *U.S.* 68, 72–73, 85 *S.Ct.* 1301, 1304–1305, 14 *L.Ed.*2d 223, 227 (1965) (Commissioner may retroactively correct mistakes of law in application of tax laws to particular transactions, even where taxpayer may have relied to his detriment on past practice). Also, the Division, in active litigation, asserted the taxability of such transactions. *Fisher-Stevens, Inc., supra,* 121 *N.J.Super.* 513. Moreover, the official instructions accompanying the sales tax returns did not mention or recognize any exemption for services provided out-of-state customers.

Both Airwork and *amicus* Consumer Bureau, Inc., rely on cases from other jurisdictions in which courts have not permitted taxing authorities to change or modify their position. However, many of these cases involve the power to apply new regulations retroactively, *see, e.g., Illinois Bell Tel. Co. v. Allphin,* 95 *Ill.App.*3d 115, 50 *Ill.Dec.* 739, 419 *N.E.*2d 1188 (1981); *Appeal of Denman,* 120 *N.H.* 568, 419 *A.*2d 1084 (1980); *Department of Revenue v. Family Hosp., Inc.,* 105 *Wis.*2d 250, 313 *N.W.*2d 828 (1982); *Hercules Powder Co. v. State Bd. of Equalization,* 66 *Wyo.* 268, 208 *P.*2d 1096 (1949), reh'g denied, 66 *Wyo.* 309, 210 *P.*2d 824 (1948). The instant case appears to involve the converse situation, namely, the application of the controverted tax to cover previous tax years is in accord with the

enabling tax statute, consistent state fiscal concerns, and legislative policy.

The Legislature presumably has been long aware of the issues implicated in the taxability of services performed for out-of-state customers. In 1974, the Legislature passed A. 1628, designed to exempt from taxation repair work on tangible property delivered to out-of-state customers. This bill was vetoed by the Governor, whose veto message explained:

> I strongly believe that such an amendment would represent a substantial and excellent step forward in reforming the present business tax structure that now plagues the economy of this State. However, I cannot overlook the fact that enactment of such an amendment may result in the loss of approximately $5 million in tax revenue for the State. During this time of fiscal crisis, it would be irresponsible for me to allow such an amendment to become law without having the ability to recoup the loss through another revenue raising device.

A similar bill was finally enacted in 1977. *L.*1977, *c.* 54, *N.J.S.A.* 54:32B-3(b)(5) (as amended). The committee statements accompanying both bills reflect legislative disapproval of a tax on such services, as it would impose hardship on New Jersey businesses, some of which may have relied on the Division's earlier failure to impose the tax. It is more significant, however, that in enacting *L.*1977, *c.* 54, the Legislature itself did not choose to apply the statutory exemption retroactively. Further, the Governor's veto in 1974 of previous legislation reinforces the policy that a retroactive recognition of the exemption for such services would be contrary to public policy.

Other states have announced a *per se* rule against estopping the government from collecting taxes. *See, e.g., State v. Maddox Tractor & Equip. Co.*, 260 *Ala.* 136, 69 *So.*2d 426 (1953); *Claiborne Sales Co., Inc. v. Collector of Revenue*, 233 *La.* 1061, 99 *So.*2d 345 (1957); *Henderson v. Gill*, 229 *N.C.* 313, 49 *S.E.*2d 754 (1948)(in collection of sales tax, error of an administrator should not serve to redistribute tax burden as imposed by

the Legislature). We conclude, under the circumstances of this case, that when a sales tax statute specifically provides for the taxation of particular transactions and does not explicitly provide for the tax exemption of such transactions, estoppel should not generally be available to a subject taxpaper. The strong public and governmental interest in the collection of the tax imposed by the Legislature will usually outweigh the asserted reliance by a taxpayer, especially when such reliance is claimed to be based on unofficial statements and equivocal administrative inaction.

In summary, we hold that principles of equitable estoppel or similar considerations do not prevent the collection of the sales taxes against the taxpayer as determined by the Director.

III

[5] Airwork argues that before changing its position, the Division was obliged to follow the procedures of the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to 1-15, governing the promulgation of administrative rules. The Tax Court concluded, however, that the Division's tax assessment did not constitute rule-making and therefore was not subject to the APA. 2 *N.J.Tax* at 340-41. While *N.J.S.A.* 54:32B-24(1) gives the Division the power to make rules, the Director, under *N.J.S.A.* 54:32B.-24(6), has the power "[t]o assess, determine, revise and readjust the taxes imposed by this act." The Tax Court held that in assessing the tax against Airwork, the Division was acting pursuant to this power. The Appelllate Division affirmed the Tax Court. We agree.

N.J.S.A. 52:14B-2(e) defines an administrative agency "rule" as follows:

> "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the

amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.

If an agency determination or action constitutes an "adminstrative rule," then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules. *Metromedia v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984).

We have considered the question of when a determination of the Division of Taxation imposing a tax assessment can appropriately be found to implicate agency rule-making, thereby necessitating conformity with the APA. We stated in *Metromedia v. Director, Div. of Taxation*, decided today:

> [A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.
> [96 *N.J.* at 331.]

In this case, applying the *Metromedia* standards, we are satisfied that the Director's assessment was not invalid for want of an authorizing rule or regulation. Here, the taxability of these services is sufficiently clearly and directly inferable from the tax

statute itself, especially in the absence of a specific exemption. See discussion, *supra* 320-323. Further, it has not been demonstrated that the determination represents a material and significant change in adminstrative policy, even though for several years the taxing authority did not impose the tax. Past policy was itself equivocal, was not officially endorsed, and was not definitively settled. Further, it seems clear that the agency action properly applies retroactively to this particular case and could be applied to similarly situated taxpayers. Finally, the broad fact-finding and informational procedures typical of rule making are not warranted in this case in order to buttress the soundness of the determination or to assure fairness to individual litigants. In terms of the actual assessment, Airwork had every opportunity to challenge with countervailing proofs the application of the tax. Each taxpayer to whom the tax is sought to be imposed will similarly be free to contest the application of the tax to its operations. Accordingly, we conclude that the Director had the authority in this case to proceed by way of adjudication.

IV

We acknowledge that constitutional issues have been asserted at various stages of this litigation, some by the taxpayer and some by *amicus*. These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their viability, decline to address them.[1] The taxpayer also argues that the assessment applies only to the cost of labor, not to the cost of parts. This issue, however, was raised for the first time on appeal, and the Appellate Divi-

[1]The taxpayer asserts that goods sold and delivered to out-of-state customers are immune from taxation under the federal Commerce Clause. It also makes an equal protection argument along these lines, questioning the rationality of such a distinction. *Amicus* American Civil Liberties Union of New Jersey argues that the retroacive imposition of the sales tax violates plaintiff's constitutional right to substantive due process under both federal and State constitutions.

sion declined to consider it. We similarly decline to deal with this issue, recognizing that the taxpayer may pursue this as well as its constitutional claims before an appropriate tribunal if it chooses to do so.

In conclusion, we hold that the tax assessment imposed on the taxpayer in this case is in accordance with the terms of the Act; it was permissibly imposed on transactions for the years involved; and it does not in the circumstances presented constitute invalid rule-making.

Accordingly, the judgment below is affirmed.

GARIBALDI, J., dissenting.

It is the part of a good shepherd to shear the flock, not flay it. [Tiberius Caesar, A.D. 25.]

Justice Frankfurter once noted that "[e]ven tax administration does not as a matter of principle preclude considerations of fairness." *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 *U.S.* 293, 297, 65 *S.Ct.* 1162, 1165, 89 *L.Ed.* 1619, 1623 (1945). Today's decision loses sight of the need for fairness. It allows the Division of Taxation (Division), long after the transactions in question were closed, to extract from Airwork Service Division (Airwork) sales taxes that the Division itself informed Airwork it should refrain from collecting from its out-of-state customers. The Division has been able to accomplish this apparently draconian result by successfully arguing that Airwork should never have relied on its information in the first place.

Given the prior published position of the Division, Airwork's understandable reliance on that announced position, the nature of the sales tax, and Airwork's current inability to collect the sales taxes, the retroactive imposition of the sales tax produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct. I believe that an agency may not reverse itself retroactively when doing so will

cause extraordinary detriment to those who have relied in good faith on the agency's prior position. Further, as the imposition of sales tax here allows the state to revise its earlier publicized position without first providing a taxpayer with notice of the change, it violates the Administrative Procedure Act (APA), *N.J.S.A.* 52:14B-1 to -15, governing the promulgation of administrative rules. Hence, I disagree with the majority, and would hold the sales-tax assessment invalid.

I

Administrative agencies need flexibility to exercise their executive role through rulemaking and adjudication so that they may effectuate public policy. *See In re Kallen*, 92 *N.J.* 14, 24–25 (1983). As a result, they have great discretion in selecting the form of proceeding best suited to achieving their aims. *See In re Uniform Admin. Procedure Rules*, 90 *N.J.* 85, 92 (1982); *Texter v. Department of Human Servs.*, 88 *N.J.* 376, 383–84 (1982); *Bally Mfg. Corp. v. New Jersey Casino Control Comm'n*, 85 *N.J.* 325, 338 (1981) (Handler, J., concurring).

This discretion is not unlimited, however. This Court has not hesitated to apply principles of fundamental fairness, beyond those required by the Constitution, to administrative agency actions. *See In re Arndt*, 67 *N.J.* 432 (1975); *Monks v. New Jersey State Parole Bd.*, 58 *N.J.* 238 (1971); *cf. State v. Tropea*, 78 *N.J.* 309, 315-16 (1978) (although retrial of charge of speeding was not barred by Constitution, "considerations of fundamental fairness" militated against retrial when it would merely afford the State another opportunity to produce evidence of the applicable speed limit that the State had failed to produce originally); *Rodriguez v. Rosenblatt*, 58 *N.J.* 281, 294-95 (1971) ("considerations of fairness" dictated that counsel be provided to indigents charged in municipal courts with disorderly persons or other petty offenses). "When specific parties are

particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." *Bally Mfg. Corp. v. N.J. Casino Control Comm'n, supra,* 85 *N.J.* at 345 (Handler, J., concurring).

"[T]here are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its own merits". *In re Kallen, supra,* 92 *N.J.* at 27. The determination of whether agencies have observed principles of basic fairness therefore requires "an examination of the facts in each case, giving weight to the effect of the decision on the agency's public policy." *Id.* at 26. My review of this case clearly establishes that the retroactive imposition of the sales tax on Airwork would be harsh and unfair.

Airwork had no reason to believe it was not conforming to the Division's policy. In 1966, after the passage of the New Jersey Sales and Use Tax Act, *L.*1966, *c.* 30, § 1(Act), the Sales Tax Bureau of the Division issued an "Official News Release" (Release), *New Jersey Tax Rptr. (CCH),* No. 162, (July 11, 1966), stating *inter alia:*

> Charges for repairs where the articles upon which the work is performed are delivered upon completion, pursuant to contract, to a purchaser outside the state for use outside the state are exempt from the sales tax.

The Division never adopted formal regulations governing this specific issue. Thus the Release, continuously printed, was the only statement on the topic for seven years.

In reliance on the Release, Airwork, which is principally engaged in the business of repairing aircraft engines, did not collect sales tax from its out-of-state customers. It did collect sales tax from its New Jersey customers. From Airwork's point of view, a 1967 tax audit confirmed the viability of this position.

During its 1967 audit of Airwork, the Division concluded that Airwork's policy of not collecting sales tax from its out-of-state customers was correct. Although neither the Release nor the audit bars the Division from changing its policy, they do raise questions about the fundamental fairness of changing a policy without at least giving a taxpayer notice of that change.

On August 12, 1971, the Division of Tax Appeals promulgated its decision in *Fisher-Stevens Inc. v. Director, Div. of Taxation,* Docket S.T. 109, aff'd, 121 *N.J.Super.* 513 (App.Div.1972), certif. den., 62 *N.J.* 575 (1973). Two years after the Division of Tax Appeals decision in *Fisher-Stevens,* and only *after* the Appellate Division's decision in *Fisher-Stevens,* the Division first published a document contradicting the Release. In its August-September 1973 edition of *State Tax News,* a bi-monthly newsletter of tax items of interest, the Division announced a complete reversal of its prior position and announced that sales of service performed on goods delivered to customers outside the State were subject to the sales tax. The next issue of *State Tax News,* the October-November 1973 issue, contained the following:

> *Service Performed in New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state * * *.

Although the APA, *N.J.S.A.* 52:14B-1 to -15, was in effect as of September 1, 1969, *see L.*1968, *c.* 410, § 1, none of the rule-making procedures was followed in connection with the Division's publications in the August-September 1973 and October-November 1973 editions of the *State Tax News.* Once alerted by these announcements, Airwork commenced collecting sales tax from its out-of-state customers until the Legislature specifically exempted those customers from the sales tax in 1977. See *L.*1977, *c.* 54.

After publication of these announcements, the Division notified Airwork of its intention to assess sales and use tax for the period from July 1, 1970 to June 30, 1973. Because of the Release, however, the Division later took the position that the assessment period began August 12, 1971, the date of the Division of Tax Appeals' decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation, supra,* Docket S.T. 109. The assessment was for $628,255.31.

II

The Division cannot seriously maintain that it never changed its interpretation of the Act. The Division's lack of claim for sales tax for the period prior to the decision of the Division of Tax Appeals in *Fisher-Stevens* is itself acknowledgment that a change has occurred, as are its subsequent releases in 1973. Moreover, various statements by the Legislature concerning amendments to the Act recognize that a change in interpretation occurred.

In 1974, the Legislature passed a bill, later vetoed by the Governor for revenue reasons, that would have exempted the transactions at issue from the sales tax. The Assembly Committee on Taxation Statement to this bill provided, in relevant part:

> The committee has acted favorably on Assembly Bill No. 1628 in that it believes the bill serves to remove an inequitable situation, *and further, it is in keeping with the original interpretation of the Sales Tax Act which subsequently was changed.*
>
> * * * * * * * *
>
> *As noted during the first 6 or 7 years of the life of the act there would have been no sales tax, but several years ago, the interpretation was changed and the tax imposed.* In effect, this bill will return the situation to its original status.
>
> [Emphasis added]

Those "first 6 or 7 years" were the years from 1966 to 1972 or 1973. Thus, not only did the Legislature perceive a change but, like Airwork, it perceived that change as occurring in 1973.

Similarly, the Assembly Committee on Taxation Statement to A.1787 (1977), a bill which also exempted these transactions from sales tax, stated in relevant part:

> The bill proposes to exempt from the sales tax services provided by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State, with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations.
>
> *The imposition of the tax is one which did not occur in the beginning years of the sales tax, but was imposed by interpretation later.* Such taxes, when assessed against New Jersey businesses, in many instances incur a loss because they are unable to collect from customers after the fact.
>
> [Emphasis added.]

This bill became law in 1977. *L.*1977, *c.* 54. Since 1977, the services in question have been exempt from the sales tax.

III

The Division relies on the decision of the Division of Tax Appeals in *Fisher-Stevens* as notice of its new revised policy that sales tax is due on sales of services when delivery of the tangible personal property is out-of-state. It is difficult to see how an agency decision that is not on point and was never officially reported can constitute notice of a change in policy.

Fisher-Stevens cannot by any stretch of the imagination be said to address the application of sales tax to the services at issue in this case. In *Fisher-Stevens* the court held that services performed and delivered in New Jersey were taxable. There was

nothing novel in this approach. From the transcript of the *Fisher-Stevens* trial, it is evident that the Division's policy was not to tax the services if the finished items rather than being mailed from New Jersey were instead shipped out of the state for mailing by the customer. This policy of course reflects the exemption Airwork claims existed. To contend that Airwork somehow should have read *Fisher-Stevens* and, having digested it, should have determined that the court's language, in which it held that the "use" of direct mail services occurred entirely within this state, actually meant that the rebuilding of nonresidents' aircraft engines for use outside the state was no longer exempt from the state sales tax is beyond belief. Moreover, this expectation is even less realistic when, as here, published, official statements were made by the Division that clearly stated that the sales tax should not be collected for repair charges on articles that were to be delivered and used out of state.

Further, *Fisher-Stevens*, was not even an opinion of a court. The decision of the Division of Tax Appeals was a decision of an administrative agency. Thus, many of the opinions of the Division of Tax Appeals were never published. Those opinions that were published were not published in official reporters such as the present *New Jersey Tax Court Reports*. Unless the Division of Tax Appeals specifically granted a taxpayer's request to receive all copies of its opinions, a taxpayer could not possibly become familiar with all its opinions. Even if a taxpayer made such a request, of course, it is not clear it would be granted.

New Jersey courts have recognized these problems even with respect to reported court opinions. In *Glaser v. Downes*, 120 *N.J.Super.* 476, 491-92 (Ch.Div.1972), rev'd in part, 126 *N.J.Super.* 10 (App.Div.1973), certif. den., 64 *N.J.* 513 (1974), the trial court ruled that the gasoline service-station practice of giving free gifts for merely coming into a station was illegal. The court recognized, however, that it would be unfair to enforce *its*

decision without first giving effective notice to service stations that had been acting in reliance on the Division of Taxation's prior practice of not treating such gifts as illegal and held that:

> [T]he Director must give gasoline retailers throughout the State *ample written notice* of the illegality of each of these competitive devices. I leave to his discretion whether he takes this action by the adoption of appropriate regulations or the giving in some fashion of adequate written notice to all of the gasoline retailers operating in this State of the conclusions reached in this opinion. [*Id.* 120 *N.J.Super.* at 492 (emphasis added).]

The Appellate Division in *Glaser v. Downes, supra,* 126 *N.J.Super.* 18-19, went even further, holding that merely mailing notices to all licensed retail motor fuel dealers was inadequate. If the Director was going to change his prior position and treat the giveaways as illegal, he had to adopt regulations to that effect, and do so in the manner prescribed by the APA, especially policy previously followed by the Division of not treating such giveaways as illegal. *Id.* at 18. After ruling that the Director had to comply with the APA, the court concluded that "[w]hat he did denied due process of law to the three companines * * * involved." *Id.* at 19.

As a practical matter, allowing unreported decisions of administrative agencies to provide sufficient notice of an agency's changed position imposes an intolerable burden on the taxpayer. In addition to regularly checking regulations and Division releases, businessmen would have to meticulously check an agency's decisions, many of which are unreported, for cases that might possibly affect them. Requiring businesses to check for these decisions is a useless waste of time, energy, and money. It would be much simpler, more logical, and more efficient for the Division to simply amend an existing release or promulgate a new regulation when a case causes it to change its policy. This would adequately serve notice to taxpayers of changes in policy and comport with due process.

I recognize that the Division, with the best of intentions, issues releases informally to aid taxpayers in complying with the new tax after the enactment of a new tax statute. Nevertheless, once such a release on a specific topic is set forth, I believe that it is only fair that a change of position similarly be set forth in a notice. The Division can easily and inexpensively satisfy fairness concerns by merely issuing a new release as it later did in *State Tax News*. Such a release would have provided adequate notice to Airwork to collect sales tax from its out-of-state customers. The cost to the state of such a notice would have been minimal. Thus, to the extent that administrative costs or effects on the efficient operation of government may be legitimate concerns in assessing what process is due in any case, *see Mathews v. Eldridge*, 424 *U.S.* 319, 335, 96 *S.Ct.* 893, 903, 47 *L.Ed.*2d 18, 33 (1976), such concern is easily satisfied here.

I would hold, therefore, that Airwork first received sufficient notice of the Division's change of policy in 1973 when the change was announced in issues of *State Tax News*.

IV

If Airwork did not receive sufficient notice of change in policy until 1973, then the Division's assessment of sales tax prior to that date is retroactive. This Court has recognized that constitutional due process imposes certain limits on the retroactive application of taxing statutes. *See Klebanow v. Glaser*, 80 *N.J.* 367 (1979). As stated by the Supreme Court in *Welch v. Henry*, 305 *U.S.* 134, 147, 59 *S.Ct.* 121, 125, 83 *L.Ed.* 87, 98 (1938), and quoted with approval by this Court in *Klebanow, supra*, 80 *N.J.* at 376:

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Or, stated another way:

> The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. [*Id.* at 375 (quoting with approval *Untermyer v. Anderson*, 276 *U.S.* 440, 450, 48 *S.Ct.* 353, 356, 72 *L.Ed.* 645, 649 (1928)) (Brandeis, J., dissenting).]

The hardship that exacerbates the unfairness of retroactive application of the agency rule here is that the reversal of the rule has transformed a statutory agent for the collection of tax into a delinquent taxpayer. *Cf. Central Ill. Pub. Serv. Co. v. United States*, 435 *U.S.* 21, 33 n. 12, 98 *S.Ct.* 917, 923 n. 12. 55 *L.Ed.*2d 82, 91 n. 12 (1978) (expressing concern that retroactive assessment of tax on an employer who had failed in good faith to withhold taxes for employee wages in the form of lunch reimbursement would be "almost punitive in light of the facts"). Although personally liable for the taxes required to be collected under the Sales and Use Tax, *N.J.S.A.* 54:32B-14, Airwork's role in the statutory scheme is as *tax collector* on behalf of the state of New Jersey. *See N.J.S.A.* 54:32B-12. It was in this capacity that Airwork, and others similarly situated, were advised by the Division not to collect the sales tax on services performed for out-of-state customers. The effect of retroactive application is to allow the consumer to escape the tax, while imposing it instead on the vendor. As such, retroactive application changes the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services. The vendor can no longer collect the tax from the customer after the transaction has been completed, yet retroactive application *first* imposes the tax *after* the transaction has occurred.

The hardship is particularly worthy of note when the taxpayer could have been expected to refrain from the conduct that created his tax liability had he anticipated the tax. *See Welch v.*

Henry, supra, 305 *U.S.* at 147, 59 *S.Ct.* at 125, 83 *L.Ed.* at 93; *Pressed Steel Car Co. v. Lyons,* 7 *Ill.*2d 95, 105–06, 129 *N.E.*2d 765, 770–71 (1955); *Hercules Powder Co. v. State Bd. of Equalization,* 66 *Wyo.* 268, 306, 208 *P.*2d 1096, 1112, reh'g denied, 66 *Wyo.* 309, 210 *P.*2d 824 (1948); *cf. In re Kaplan,* 178 *N.J.Super.* 487, 496 (App.Div.1981) (notions of fundamental fairness impaired in action to retroactively enforce Medicaid anti-fraud provision in part because had appellant been able to anticipate the statute "it seems likely that appellant would have altered his conduct"). Here the conduct that created Airwork's liability was its failure to collect and pay to the state the sales tax. That conduct surely would have been avoided by Airwork had it known or anticipated that its repairs on out-of-state property would be taxed. Simply stated, had Airwork known that the state would treat such repairs as taxable, it would have collected the tax from its out-of-state customers. Indeed, once Airwork received notice in 1973 that the state would treat these repairs as taxable, it immediately began collecting the tax from its out-of-state customers.

V

Today in *Metromedia, Inc. v. Director, Div. of Taxation,* 97 *N.J.* 313 (1984), we held that the Division's decision to apply the audience share factor in allocating taxpayer's receipts to New Jersey was tantamount to an agency rule and consequently had to be promulgated in accordance with the APA. In that opinion, we stated:

> Similarly, an agency determination can be regarded as a "rule" when it effects a material change in existing law. *See Crema [v. New Jersey Dept. of Environmental Protection], supra, 94 N.J.*[286]at 302; K.C. Davis, *Administrative Law Treatise* § 7:25 at 186 (2d ed. Supp.1982); *Ford Motor Co. v. Fed. Trade Comm'n,* 673 F.2d 1008, 1009 (9th Cir.1981), *cert.* den., [459] *U.S.* [999, 103 *S.Ct.* 358], 74 *L.Ed.*2d 394 (1982) (an agency determination that changes existing law and has widespread application must be addressed by rule-making and not adjudication). This

feature relates not only to fairness to the individual party actually before the agency but to other persons as well. When an agency's determination alters the *status quo*, persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination. *See Bergen County Pines Hosp. [v. Dept. of Human Services], supra*, [96] *N.J.* [456]; *Crema, supra*, 94 *N.J.* at 303; *Boller Beverages, Inc. [v. Davis], supra*, 38 *N.J.* [138] at 151. [Id. at 330.]

We further held that one of the factors determining whether an agency determination must be considered an administrative rule is whether it "reflects an administrative policy that * * * constitutes a material and significant change from a clear, past agency position on the identical subject matter." *Id.* at 331.

I disagree with the majority and believe that based on the totality of circumstances in this case, it is clear that the policy announced in 1973 in the *State Tax News* constituted a material and significant change from the prior policy of the Division as stated in its Release. This conclusion is confirmed by the Division's audit of Airwork, is reflected in its failure to assess taxes for the entire period, and is affirmed by the Legislature's statements.

Both the Tax Court and the majority assume that Airwork is contesting the right of the Division initially to make such a ruling under its assessment power. I am not. I am however, claiming that once such a ruling is made, it may not be changed without notice to the affected public. Particularly in a case like this that transforms Airwork from the role of tax collector to that of primary taxpayer, lack of notice produces an extraordinarily harsh and unfair result.

Accordingly, I would hold under the APA that Airwork was entitled to notice of the Division's changed position set forth in its 1973 Release. Since the Division failed to give notice, it vio-

lated the procedures under the APA and I would hold its assessment invalid.

For affirmance—Chief Justice WILENTZ and Justices SCHREIBER, HANDLER and O'HERN—4.

For Reversal—CLIFFORD, POLLOCK and GARIBALDI—3.